

Case Study
The Use and Limits of Agency Guidance Documents
Appalachian Power Co. v. EPA, 208 F.2d 1015 (D.C.Cir. 2000)

Title V of the Clean Air Act, implemented through rulemakings promulgated by EPA in 1992, required all stationary sources of air pollution to obtain operating permits from State or local authorities, and required States to submit to EPA for its review, in addition to a Statewide implementation plan, all operating permits. The rules implementing Title V further required that each State permit require the same monitoring and analysis called for under applicable State law. Where the applicable State requirements did not require periodic testing, the 1992 rules required the State to include, as a condition of the permit, periodic source monitoring.

The Appalachian Power Company (Petitioner), on behalf of electric utilities and trade associations representing U.S. chemical and petroleum industries, challenged the validity of an EPA document entitled “Periodic Monitoring Guidance,” released in 1992. Specifically, petitioners challenged EPA’s position in the Guidance that “*periodic monitoring is required for each emission point subjected to Title V of the Act.*” Petitioners claimed that the Title V rule provided only for “gap filling;” i.e., requiring State permitting agencies to impose periodic monitoring only in instances where applicable State emission standards contained *no* monitoring requirement. Where the State standard already included *some* testing requirement, Petitioners argued it was this, existing, testing requirement that must be incorporated into the permit. Petitioners also took exception to the Agency’s position that States, under these same Title V rules, could require more frequent monitoring than that provided for in applicable State or Federal law.

EPA maintained that the Guidance was not subject to judicial review because it was not final, and because it was not binding. The Court, in striking down both arguments, concluded that as a practical matter, Agency action had a binding effect and that disclaimers about the non-final nature of Guidance were meaningless. (“*This language is boilerplate; since 1991 EPA has been placing it at the end of all its guidance documents.*”) The Court went further, rebuking the Agency for giving States their “marching orders” through the Guidance, and expecting them to “fall in line.” (“*The entire Guidance - from beginning to end - reads like an ukase. It commands, it requires, it orders. . .*”)

In finding for the Petitioners, the D. C. Circuit commented extensively. Concluding that the Guidance substantively amended existing regulations, the Court accused the Agency of gaining a large advantage by effectively circumventing notice and comment requirements of the Administrative Procedure Act and immunizing its lawmaking from judicial review. The Court also sharply criticized the Agency’s approach of delegating to States the authority to alter duly promulgated Federal standards. Noting that nothing in the regulatory history of Title V suggested that Congress intended Title V to have the broad scope the Agency now ascribed to it, the Court set aside the EPA guidance document in its entirety.